Equal Opportunity Tasmania

Optional Protocol for the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in Australia

Submission by the Anti-Discrimination Commissioner (Tas) to Australian Human Rights Commission consultation on the implementation of OPCAT in Australia

September 2018

Celebrating Difference
Embracing Equality

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Introduction

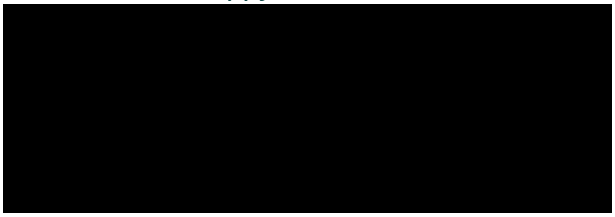
Thank you for providing me with an opportunity to contribute to Australian Human Rights Commission consultation process on the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).

I am strongly supportive of the Australian Government's decision to ratify the Optional Protocol.

It is imperative, however, that the act of ratification be accompanied by comprehensive implementation arrangements that includes measures to ensure adherence to the Protocol and allows any contravention to be identified and addressed.

OPCAT is unique in its capacity to enforce human rights protections in relation to persons who are deprived of their liberty. The right to be free of torture and ill-treatment is fundamental to the realisation of human rights and robust mechanisms to ensure that all persons are treated humanely in situations of detention is critical.

I would be happy to elaborate on these matters should you wish me to do so.



Sarah Bolt
ANTI-DISCRIMINATION COMMISSIONER (TAS)

Response to consultation questions

Question 1

How should OPCAT be implemented to prevent harm to people in detention? How should the most urgent risks of harm be identified and prioritised? The NPM may, for example, include a focus on particular:

- **categories of detainees — such as children and young people, people with disability, Aboriginal and Torres Strait Islander people and people held in immigration detention**
- **detention practices — for example, solitary confinement or disciplinary sanctions**
- **places of detention**
- **jurisdictions**

States are able to detain people through a wide variety of means. Whilst traditionally places of detention are seen to refer to places such as prison or police custody, there is growing recognition that there are other places where people are deprived of their liberty and the impact of that deprivation has the potential to expose them to cruel and degrading treatment. This includes immigration detention centres, locked areas within aged care facilities, dementia units and residences or facilities for people with disability.

Obligations under the Optional Protocol apply to all places where people are deprived of their liberty and it is our strongly held view that all places where people are deprived of their liberty should be monitored under OPCAT.

In Tasmania, the Ombudsman is appointed as the Tasmanian Custodial Inspector under the *Custodial Inspector Act 2016* (Tas). This appointment occurred on 31 January 2017.

The Tasmanian Custodial Inspector is to provide 'independent, proactive, preventative and systemic oversight of custodial centres.'[1] As a result of inspections, the Custodial Inspector reports to the Minister who is required to table the Inspector's report in each House of Parliament.

The legislation also prescribes the power of the Custodial Inspector. Broadly, these powers include:

- the right to visit and examine custodial centres including areas that are related to the custodial centre;

[1] https://www.custodialinspector.tas.gov.au/about_us

- obtaining information, access to documents and information relating to custodial centres or persons in custody, including obtaining information from persons in any manner.

These legislative powers ensure that the Custodial Inspector has access to sites, information and material required to undertake his or her functions.

However, under the *Custodial Inspector Act 1997* (Tas), the Custodial Inspector's power to inspect is limited to custodial centres.

Custodial Centre is defined as:

> custodial centre means –
>
> (a) a prison within the meaning of the Corrections Act 1997; and
>
> (b) a detention centre –
>
> …

Detention centre is defined as:

> **detention centre** means a detention centre within the meaning of the *Youth Justice Act 1997*;

These narrow definitions limit the Custodial Inspector's power to two types of facilities where detention occurs. This means that other places where people may be kept against their will are excluded. Specifically, the *Custodial Inspector Act 1997* (Tas) excludes police stations and court cell complexes. Nor does it cover other places of detention such as aged care facilities, dementia or other mental health units and group home facilities for children.

The purpose of the *Custodial Inspector Act 1997* (Tas) provides the reasoning behind this narrow definition, in that the aim of the legislation is to provide 'independent, proactive, preventative and systematic oversight of custodial centres by the Custodial Inspector'.

This is step in the right direction, however it does not go far enough. OPCAT applies to all places where people may be detained, including mental health facilities, hospitals, police and emergency transport vehicles etc. As a consequence, there will be a need to either extend the scope of the custodial inspector to include all places of detention or identify alternative arrangements for this purpose.

New Zealand implemented a multiple body National Preventative Mechanism (NPM)[2] which comprises different organisations which are responsible for specific places of detention. There is also a central monitoring body (the Central National Preventative Mechanism, which is the Human Rights Commission) that is responsible for coordination.

[2] https://www.hrc.co.nz/files/2214/2398/7100/Opcat-2013_web.pdf

This approach has enabled the focus to be spanned across all of the above categories, depending on the specific expertise of the relevant NPM. Those NPMs also act collaboratively, by meeting regularly, sharing knowledge, and including persons from different NPMs on site visits.

Using established organisations which already possess a high level of expertise, is not only efficient, but also practical and a good use of existing resources. It is contingent, however, on those bodies being OPCAT compliant and adequately skilled and resourced to undertake the functions required by the Protocol.

Whilst the Commonwealth has indicated a preference for the Commonwealth Ombudsman to act as the co-ordinating NPM body, it is arguable that the Australian Human Rights Commission should have the authority to act as the central monitoring body, and for each of the states and territories to utilise their own human rights or equal opportunity commission to coordinate the functions of the National Preventative Mechanisms in that state or territory.

This approach would allow urgent risks of harm being identified and prioritised on a state to state basis. Instead of a blanket approach nationally to one area of harm, this approach will be more effective in that each state and territory will have the ability to understand and prepare responses to the unique issues that emerge.

This prevents a restrictive approach being taken, which may have the effect of disregarding or ignoring significant human rights issues. A focus on one area, such as a certain category of detainee, has a resultant effect of the rights of others' being deprioritised, furthering inequity and leaving some of the population to remain vulnerable to human rights abuses.

Alternatively, if one of the above categories is to be selected, an argument can be made for the focus to be on detention practices. This focus may enable investigators to work across categories of detainees, jurisdictions, and places of detention, while capturing other significant data which may result in further categories being identified.

The collection and analysis of detention practices will also enable investigators to identify how practices may change depending on the place of detention and identify patterns across jurisdictions which could inform further policy development and legislative action at the federal level.

Should the preference be to prioritise places of detention that present the highest risk in the first instance, we are strongly of the view that a phased approach should be adopted to ensure that all facilities that fall into the scope of the Protocol are added over time and that an appropriate body is given powers in each State and Territory to conduct investigations in unmonitored facilities should representations or complaints suggest that improved oversight is warranted.

Question 2

What categories of 'place of detention' should be subject to visits by Australia's NPM bodies?

As proposed above, there is an argument to be made for a comprehensive and wide-ranging approach to be taken in respect of investigation of places of detention.

This is in line with the scope of monitoring powers under OPCAT which applies to any place where a person is or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation of with its consent of acquiescence.[3]

Article 4.2 of OPCAT defines deprivation of liberty widely and does not include an exhaustive list. It is a form of detention or imprisonment of the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

To establish an exhaustive list of places for inspection in contrary to the aims of OPCAT and may potentially create further administrative and resourcing issues at a later date. To allow different jurisdictions to identify places of detention to investigate is arguably much more practical.

This is because, as stated earlier, each jurisdiction faces its own issues in its detention facilities and each also have different detention facilities. For example, to limit places of detention subject to visits by Australian NPM bodies to prison facilities, may have the effect of rendering the implementation of OPCAT in Tasmania redundant due to existing monitoring legislation.

In Tasmania, custodial centres, as defined within the *Custodial Inspector Act 1997* (Tas) are already subject to investigation and monitoring by the Custodial Inspector. Therefore to create a limiting and exhaustive list of 'places of detention' subject to monitoring, at least in the jurisdiction of Tasmania is both futile and out of line with the aims of OPCAT itself.

[3] Article 4.1, OPCAT

Question 3

What steps should be taken to ensure that measures to implement OPCAT in Australia are consultative and engage with affected stakeholders? This might include processes for:

- **co-ordination between NPM bodies**
- **civil society organisations and people with lived experience of detention to provide ongoing input to the NPM bodies**
- **education that promotes human rights protection within detention places**
- **engaging with the UN Sub-committee on the Prevention of Torture.**

Any information gathering in relation to possible human rights abuses should be covered by the appropriate protective (whistle-blowing) measures. Where there are organisations, particularly government organisations, which are being exposed as possibly perpetrating torture or other degrading treatment then it is imperative that those people speaking out are protected.

This is especially pertinent in Australia's multicultural society, where some humanitarian migrants may have experienced torture or abuse at the hands of a previous government, making them untrusting of government and afraid of exposing wrongdoing for fear of repercussions for them and/or their families.

In terms of consultation, information may also be gathered from people who have previously been detained but have since been released, as these people may be more willing to discuss their experience without fear of repercussions. Additionally, speaking to other people who visit facilities but who have not been detained may provide imperative eye-witness accounts of abuse.

It is also important that NPMs are comprised of experts, but that they also have a balance of genders, culturally and racially diverse people, people with disability and people of a range of different ages involved in their work. This will ensure that the NPM is truly reflective of the community it is responsible for monitoring.

As proposed earlier in our submission, we consider there is a need for each state and territory to have in place appropriate mechanisms to enable cooperation across NPMs operating in that jurisdiction. For this purpose we propose that human rights or equal opportunity commission in each jurisdiction be responsible for coordinating the functions of the National Preventative Mechanisms in that state or territory. This will help to ensure that the actions of NPMs in each jurisdiction develop a degree of cooperation and work together where systemic issues of law or policy are raised.

Regular meetings of NPMs would allow information, experience and ideas to be exchanged and new or emerging issues or places of concern to be identified. A Memorandum of Understanding between each of the NPMs and the central coordinating body could formalise this relationship.

Question 4

What are the core principles that need to be set out in relevant legislation to ensure that each body fulfilling the NPM function has unfettered, unrestricted access to places of detention in accordance with OPCAT?

We are strongly of the view that legislation governing the powers and responsibilities of NPMs should include the following elements:

1. A statutory duty to make enquiries and investigate in circumstances where there is reasonable grounds to suspect torture or ill-treatment is or has taken place.
2. Authority to make binding recommendations regarding actions to prevent torture or ill-treatment.
3. Provisions which provide the authority with coercive information-gathering powers, such as the power to require a person to answer questions or produce documents in circumstances where there is reasonable grounds to suspect that abuse or ill-treatment is or has occurred.
4. Powers to enter and search a facility where these is reasonable ground to suspect that abuse or ill-treatment is or has occurred.
5. The ability 'as needed' to engage relevant experts with specialist expertise and knowledge in particular types of facilities or in relation to particular practices to participate in site visits and assist with the preparation of recommendations and reports.
6. Appropriate protections for those who in good faith report suspected abuse or ill-treatment.
7. The ability to take and act on complaints from a broad range of stakeholder, including those who are themselves detained.
8. The ability to conduct interviews in private with detainees and other relevant people
9. The ability to conduct own motion investigations and/or thematic reviews in circumstances where systemic issues or practices may warrant consideration and the preparation of guidance across multiple places of detention.
10. The ability to conduct 'unannounced' visits where there is reasonable grounds to suspect that abuse or ill-treatment is or has occurred.
11. Mechanisms for the preparation of reports, responsibilities for responding to recommendations and authority to make findings publicly available.
12. Obligations on organisations and facilities responsible for detention to cooperate with NPMs, including penalties in circumstances where this is not forthcoming.

Importantly we also consider that the legislation should provide a statutory framework for setting out protocols and standards governing places of detention from a rights based perspective.

Question 5

The Commission's Interim Report contains a number of preliminary views, expressed as Proposals, regarding how OPCAT should be implemented in Australia. Do you have any comments about these proposals to ensure Australia complies with its obligations under OPCAT?

We consider there is merit in looking at ways in which OPCAT monitoring could supplement or enhance existing and proposed systems of oversight and audit.

In the area of disability, for example, the Disability Discrimination Commissioner in his report *A Future Without Violence: Quality, safeguarding and oversight to prevent and address violence against people with disability in institutional settings*[4], has made recommendations on the operation of effective quality, safeguarding and oversight systems in both the disability sector covered by the National Disability Insurance Scheme and mainstream sectors. The following six essential elements of an effective quality, safeguarding and oversight system identified by the Commissioner are as follows:

1. A human-rights based approach
2. A connected and integrated system
3. Independent oversight and monitoring
4. Robust prevention and response elements
5. Accessibility for people with disability
6. Continuous system improvement through data

Many of these elements are expected to be included in the Safeguarding and Quality Framework and the establishment of an NDIS Commission, however the Commissioner identified the need for strengthened preventative and response mechanisms (such as Community Visitor Schemes) to ensure a connected an integrated system that promotes independent oversight and monitoring.

Similarly, bodies such as the Australian Law Reform Commission have called for improved safeguarding mechanisms for the protection of older persons at risk of violence, abuse or neglect.[5] Among other recommendations, the ALRC identified the need for:

- A new serious incident response scheme for aged care
- Regulation of the use of restrictive practices
- Adult safeguarding laws in each State and Territory which establish an agency with powers to make inquiries where there is reasonable grounds to suspect that a person is at

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4 Australian Human Rights Commission, *A Future Without Violence: Quality, safeguarding and oversight to prevent and address violence against people with disability in institutional settings* (June 2018)

5 Australian Law Reform Commission, *Elder Abuse – A National Legal Response: Final Report* (ALRC Report 131, May 2017)

risk.

The ALRC has also pointed to the importance of Community Visitor Schemes, for example, as a mechanism for independent oversight of closed environments such as aged care facilities.

We see merit in these approaches and are particularly interested in identifying ways in which the functions of various safeguarding mechanisms can be coordinated to ensure that all places of detention receive the appropriate oversight.

In June 2018, the South Australian Government introduced landmark legislation to establish an Adult Safeguarding Unit in South Australia[6]. The Unit will be the first of its kind in Australia and will have strong investigatory and oversight powers in relation to all adults who are vulnerable to abuse and neglect. The Unit will also focus on ways to minimise harm through early intervention, multi-agency coordination and information sharing. We are strongly supportive of this approach and have raised the option of similar legislation being enacted in Tasmania.

It is our view that further consideration should be given as to how the safeguarding mechanisms being examined could usefully sit with the function of OPCAT's preventative mechanisms as part of a truly integrated approach to the prevention of torture and ill-treatment of Australia's most vulnerable citizens.

6 www.legislation.sa.gov.au